IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50476

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICARDO SANDOVAL and HECTOR HERNANDEZ,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
(EP-94-CR-28-1,2, & 4)

(May 18, 1995)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

I

In July 1993, Ismael Calderon asked Quinton Williams if he would drive a truck loaded with marijuana through a border patrol checkpoint. Williams agreed and Calderon stated he would contact some other people first and then discuss the details with Williams. Two days later, Calderon picked up Williams and they drove to a

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

residence owned by defendant-appellant Hector Hernandez. While at the residence, Hernandez placed a phone call, stating he needed to contact someone else, and all three men awaited the return call. Fifteen minutes later, Hernandez received the call and told Calderon and Williams that they were to go to Jo Jo's Beer Depot to meet another person. At Jo Jo's, Hernandez met with defendant-appellant Ricardo Sandoval and introduced him to Calderon and Williams. Hernandez later admitted that he was to be paid $800 for this introduction. Williams then asked Sandoval how many pounds of marijuana he would be transporting, but Sandoval responded that he did not know and would need to talk to someone else. Sandoval then asked Williams about his experience in transporting marijuana. Nevertheless, Sandoval told Williams they needed more people and left to make a phone call. Upon his return, Sandoval told Williams they needed to go to the Taco Cabana. At the Taco Cabana, Sandoval introduced Williams to two men known as Manuel and Nacho--two men later identified as the owners of the truck used to transport the marijuana. Manuel, Nacho, and Williams alone discussed the marijuana transportation scheme, and Manuel and Nacho agreed to pay Williams $16,000[1] for transporting the load through the checkpoint. While this conversation was taking place, Calderon, Sandoval, and Hernandez were talking nearby. After finishing the negotiations, Williams, Nacho, and Sandoval exchanged telephone and beeper

[1]Williams and Calderon agreed that Williams would keep $6,000 and give Calderon the remaining $10,000.

numbers and agreed to get in touch with each other later that week. Williams left with Calderon and Hernandez, who exchanged telephone and beeper numbers with Williams.

About three days later, Williams was paged by an unknown person and told to meet at the Taco Cabana. When he arrived, Sandoval was waiting for him. Shortly thereafter, they were joined by Manuel, Nacho, and an unknown individual. In the presence of Sandoval, the men then discussed whether Williams could pick up a truck, but Sandoval claims he did not participate in the discussion. Williams, Nacho, Manuel, and the unknown individual then left Taco Cabana. Williams proceeded to drive the truck loaded with marijuana through the checkpoint at which time he was arrested. The arresting officers seized 2,596.99 pounds of marijuana (in excess of 1,000 kilograms) from the truck, but later the marijuana inadvertently was destroyed before the defendants--independent of the DEA agents--had an opportunity to determine its weight. After Williams's arrest, his wife, Veronica Perez, contacted Hernandez who agreed to assist her in obtaining a lawyer and bail for Williams. After Hernandez's arrest and in a search of his home, DEA Special Agent Raymond Kelly found an address book containing phone numbers for Calderon's and Hernandez's pager listing Sandoval's number in the memory. Williams entered into a plea bargain with the government, pled guilty to possession with the intent to distribute marijuana, and testified against Sandoval and Hernandez at trial.

Sandoval and Hernandez were convicted in the United States District Court for the Western District of Texas of conspiracy to possess with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and § 846 and of possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). The court sentenced both defendants under § 841(b)(1)(A) to 120 months imprisonment on each count to run concurrently and five years supervised release.

On appeal, both Sandoval and Hernandez argue that the evidence presented at trial was insufficient to convict them of the substantive offense of possession with the intent to distribute marijuana. Second, each of them argues that the district court erred in sentencing them based on 1,000 kilograms of marijuana when the marijuana was destroyed prior to sentencing. Finally, Sandoval alone argues that insufficient evidence was presented at trial to convict him of conspiracy and that he was denied a fair trial when the district court admitted prejudicial testimony.

II

A

In reviewing the sufficiency of the evidence, we must determine whether, "viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a reasonable doubt." United States v. Rodriguez,

993 F.2d 1170, 1175 (5th Cir. 1993), cert. denied, 114 S.Ct. 1547 (1994). Our job is to examine the sufficiency of the evidence presented against both defendants for possession with intent to distribute marijuana and against Sandoval for conspiracy to do the same.

B

In order to prove possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a), the government was required to prove beyond a reasonable doubt (1) knowing (2) possession of marijuana (3) with the intent to distribute it. United States v. Pruneda-Gonzalez, 953 F.2d 190, 194 (5th Cir. 1992), cert. denied, 112 S.Ct. 2952 (1992). Because Sandoval and Hernandez never actually possessed the marijuana, the government was required to prove constructive possession of the marijuana in order to support a conviction for possession with the intent to distribute. "Constructive possession is the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Glasgow, 658 F.2d 1036, 1043 (5th Cir. 1981).

Both Sandoval and Hernandez argue that the evidence is insufficient to establish constructive possession. The government argues, however, that based on the defendants' active roles in the conspiracy, the jury reasonably could find that they had constructive possession of the marijuana. The evidence against Hernandez consists of his introduction of Calderon and Williams to

Sandoval, his offer to assist Williams in obtaining a lawyer and bail, and his address book containing Sandoval's phone numbers. With respect to Sandoval, the government presented evidence that Sandoval acted as a broker introducing Williams to Nacho and Manuel for the express purpose of transporting marijuana; that Sandoval questioned Williams concerning his experience in transporting marijuana; that Sandoval was present during a later discussion between Manuel, Nacho, Williams, and an unknown individual concerning Williams picking up the truck loaded with marijuana; and finally that Sandoval was tied to his co-conspirator, Hernandez, through his pager. Viewing this evidence, as we must, in the light most favorable to the jury's verdict, we find that the government proved only Sandoval's and Hernandez's involvement as intermediaries between Williams and Manuel and Nacho in arranging for certain services involved in transporting the marijuana. We hold that this limited evidence is insufficient to allow a rational juror to conclude that Sandoval and Hernandez had the power or intention to, or in fact did, control the marijuana, as required for constructive possession. Accordingly, we vacate both defendants' convictions and sentences on the substantive charge of possession with the intent to distribute.[2]

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[2]We point out that the defendants' convictions cannot be upheld on an aiding and abetting theory or on the theory of Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed 1489 (1946), because the jury was not instructed under either such theory. See United States v. Basey, 816 F.2d 980, 997-98 (5th Cir. 1987).

C

To establish guilt of a drug conspiracy under 21 U.S.C. §§ 841(a)(1) and 846, the government must prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to commit one or more violations of the narcotics laws and (2) the defendant's knowledge of, (3) intention to join, and (4) voluntary participation in the conspiracy. United States v. Velgar-Vivero, 8 F.3d 236, 239 (5th Cir. 1993), cert. denied, 114 S.Ct. 1865 (1994). Mere knowing presence is insufficient to sustain a conviction for conspiracy. United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991).

The government relied on the same evidence to convict Sandoval of both the substantive possession offense and the conspiracy charge. Sandoval argues that this evidence established only that he associated with people participating in a conspiracy and was present while the conspiracy was ongoing. He concludes that the government failed to establish his knowing and intentional participation in the conspiracy and simple "knowing presence" is insufficient to sustain his conviction for conspiracy. It is clear beyond any dispute that the evidence earlier set out in detail establishes that Sandoval knew of the conspiracy to transport and to distribute marijuana and that he intentionally and voluntarily involved himself in the scheme. Any argument to the contrary is frivolous. Accordingly, we affirm the judgment of the district court as to this issue.

III

We review evidentiary rulings for an abuse of discretion. United States v. Lopez, 873 F.2d 769 (5th Cir. 1989). Extrinsic evidence is admissible if it is relevant to an issue other than the defendant's character and its probative value is not outweighed by its undue prejudice. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). Threat evidence is relevant where probative of guilt in the offenses charged. United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991).

Sandoval argues that the district court denied him a fair trial by admitting the testimony of Williams basically stating that he feared for his life when he was placed in the same detention tank as Sandoval, and Sandoval asked him if he was "the one that snitched him off." Less than an hour later, Williams was moved at his request to another tank. We find this evidence probative of Sandoval's consciousness of guilt and knowledge of the conspiracy. Even if we accepted the argument that the district court erred in admitting this testimony, which we do not, the error was harmless when considered in the light of the substantial evidence presented against Sandoval on the charge of conspiracy.

We now turn to the arguments of Sandoval and Hernandez on the weight of the marijuana assessed against them in imposing their sentences.

IV

Section 841 provides that a person convicted of conspiracy to possess with the intent to distribute 1,000 kilograms or more of marijuana shall be sentenced to not less than ten years imprisonment. 21 U.S.C. § 841(b)(1)(A). In order to sentence under this provision, the district court must find by a preponderance of the evidence that the defendant conspired to possess 1,000 kilograms of marijuana. United States v. Mergerson, 4 F.3d 337, 347 (5th Cir. 1993), cert. denied, 114 S.Ct. 1310 (1994). A district court's determination of the amount of drugs involved in an offense is protected by the clearly erroneous standard of review. Id. at 345.

The district court found that the conspiracy offense, as related to both defendants, involved more than 1,000 kilograms of marijuana and sentenced each defendant to ten years under § 841(b)(1)(A). Because the marijuana was destroyed prior to sentencing, the district court conducted a hearing for the express purpose of determining its weight. At this hearing, DEA Agent Bradley testified that at the time of seizure, the marijuana was contained in 426 bundles, wrapped in cellophane and duct tape, and weighed 2,596.99 pounds; that five days after seizure, the marijuana weighed 2,601.75 pounds; and that at a third weigh, months later, the marijuana was placed in forty-two cardboard boxes and thirty-six of these boxes of marijuana (all were not weighed) weighed 2,380.60 pounds. The district court found that based on

the third and final weigh of the marijuana, if all forty-two boxes were considered with credit for wrapping and box weight, the total weight nevertheless would be over 1,000 kilograms or 2,200 pounds.

Sandoval and Hernandez argue that the district court erred in speculating that the weight of the marijuana was greater than 1,000 kilograms. We disagree. The marijuana weighed first 2,596.99 pounds and then 2,601.75 pounds, including the weight of the wrapping--cellophane and duct tape. The marijuana was not contained in boxes during these two weighs, as it was during the third weigh. Under any indulgent estimate, this cellophane and duct tape could not have possibly weighed 400 pounds, as would be required to reduce the actual weight of the marijuana below 2,200 pounds or 1,000 kilograms. Accordingly, we affirm the judgment of the district court that the marijuana unquestionably weighed more than 1,000 kilograms.[3]

Finally, Hernandez argues that the district court erred in failing to make a specific finding, when requested to do so by Hernandez, as to the amount of marijuana that was the reasonably

[3]Sandoval argues that he was denied a fair sentencing hearing because "it violates Due Process and basic fundamental fairness to conduct a sentencing hearing that is totally dependent on the amount of contraband involved when the contraband has been destroyed by the government and is not available for said hearing." This argument is without merit and actually is frivolous. In the first place, there is no dispute about the fact that there was marijuana in excess of 1,000 kilograms seized from the truck at the checkpoint, as earlier discussed. In the second place, the only relief Sandoval seeks is resentencing and the destroyed marijuana obviously will be no more available at resentencing, than it was at the sentencing now before us.

foreseeable goal of the conspiracy. See United States v. Carreon, 11 F.3d 1225, 1230-31 (5th Cir. 1994) (holding court must make determination under Guidelines as to what activity was reasonably foreseeable to each defendant in conspiracy). We point out that the district court sentenced Hernandez and Sandoval according to the statutory minimum in § 841(b)(1)(A), not taking into account the Sentencing Guidelines. Thus, the district court found it unnecessary to make a foreseeability finding under this statutory minimum. Since sentencing in this case, we have held that "the standards for determining the quantity of drugs involved in a conspiracy for guideline sentencing purposes apply in determining whether to impose the statutory minimums prescribed in § 841(b)." United States v. Ruiz, 43 F.3d 985, 992 (5th Cir. 1995). Under § 1B1.3 of the Sentencing Guidelines, Hernandez and Sandoval are each liable for all acts in which they aided and abetted. U.S.S.G. § 1B1.3(a)(1)(A). Hernandez and Sandoval aided and abetted in the conspiracy to drive this truck filled with marijuana through the border patrol checkpoint by providing a driver for the truck and, thus, are bound for the whole amount of marijuana found in the truck under § 1B1.3(a)(1)(A), regardless of foreseeability. Consequently, we find the district court's error in disregarding the Sentencing Guidelines is harmless. See Williams v. United States, 503 U.S. 193, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992) (holding remand appropriate upon finding that district court misapplied guidelines, unless harmless error).

V

In sum, we VACATE the convictions and sentences of Sandoval and Hernandez on the substantive offense of possession with the intent to distribute marijuana. In all other respects, we AFFIRM the judgment of the district court. Because each defendant was sentenced on the conspiracy count to serve a ten-year sentence--the mandatory minimum sentence for the conviction and a sentence that each is currently serving--we find it unnecessary to remand this case for resentencing. The judgment and sentence of the district court are

VACATED in part; AFFIRMED in part.